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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL KIRK LONG, Defendant and Appellant.	C080725, C081410 (Super. Ct. Nos. 62-117731 62-125434 62-125470)

Defendant Daniel Kirk Long appeals from the trial court's order granting his petition for resentencing pursuant to Penal Code section 1170.18[1] as to case No. 62-117731 and denying it as to case Nos. 62-125434 and 62-125470, and from the

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1 Undesignated statutory references are to the Penal Code.

court's order denying his request for reconsideration of its ruling. He contends the trial court should have stricken prior prison term and on-bail enhancements in case Nos. 62-125434 and 62-125470 when resentencing him in case No. 62-117731 because the felonies underlying those enhancements previously had been reduced to misdemeanors pursuant to section 1170.18. Defendant also contends that section 1170.18 applies retroactively to those enhancements. We affirm.

BACKGROUND

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal.

On June 6, 2013, defendant pleaded no contest to two counts of second degree commercial burglary (§ 459) with a maximum term of two years eight months in state prison in case No. 62-117731. On May 13, 2014, in case Nos. 62-125434 and 62-125470, defendant pleaded no contest to two counts of second degree burglary of an automobile (§ 459), and admitted enhancements for three prior prison terms (§ 667.5, subd. (b)), and for being on bail (§ 12022.1) in case No. 62-117731. The felony underlying one of the prior prison term enhancements was a 2009 Placer County conviction for receiving stolen property. (§ 496, subd. (a).) Sentencing defendant in all three cases, the trial court imposed a stipulated split term of nine years, consisting of five years in county jail and four years of supervised release. Defendant's commercial burglary conviction in case No. 62-117731 was designated the principal term.

Defendant subsequently filed a petition for resentencing as to the two commercial burglary convictions in case No. 62-117731. The People filed a response indicating no opposition to granting the petition. Defendant then filed a supplemental petition for

resentencing on the on bail and one of the prior prison term enhancements in case Nos. 62-125434 and 62-125470. The People filed oppositions to the supplemental petition.[2]

The trial court reduced the two commercial burglaries in case No. 62-117731 to misdemeanor shoplifting (§ 459.5) convictions and denied the supplemental petition on the enhancements. Resentencing defendant, the court imposed an eight-year eight-month term consisting of four years eight months in county jail and four years of supervised release. Defendant subsequently filed a request for reconsideration of the ruling, which the trial court denied.

DISCUSSION[3]

I

Proposition 47, the Safe Neighborhoods and Schools Act (the Act), which was enacted on November 4, 2014, requires "misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of

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[2] The Placer County receiving stolen property prior was reduced to a misdemeanor in a separate section 1170.18 proceeding.

[3] The Supreme Court currently has three separate but related questions pending before it presented by this case: (1) whether Proposition 47 entitles a defendant to vacate a felony conviction for failing to appear in court while charged with an offense redesignated as a misdemeanor (see *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305; *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046); (2) whether Proposition 47 applies retroactively to invalidate a prior prison term based on a felony subsequently reduced to a misdemeanor pursuant to section 1170.18 (see, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011); and (3) whether a defendant who is entitled under Proposition 47 to redesignate the felony underlying his current sentence and the felony used to enhance that sentence is entitled to have both offenses treated as misdemeanors at the time of the resentencing on the current sentence (see *People v. Buyck*s (2015) 241 Cal.App.4th 519, review granted Jan. 20, 2016, S231765).

Prop. 47, § 3, subd. (3), p. 70.) Among the affected crimes are second degree commercial burglary and receiving stolen property, which, subject to certain exceptions not relevant here, are now misdemeanors when the amount in question does not exceed $950. (See §§ 496, 459.5.)

The Act also created section 1170.18, which provides in pertinent part: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k) ("subdivision (k)").)

Application of both the prior prison term and on-bail enhancements are contingent on felony convictions in a prior case. The prior prison term enhancement requires that defendant be convicted of a felony and have served a prison term for that conviction. (§ 667.5, subd. (b).) Under section 12022.1, "if a person charged with a felony (the primary offense) is released on bail or on his or her own recognizance and subsequently is arrested for committing another felony (the secondary offense) while released from custody on the primary offense, and if that person is convicted of both offenses, he or she 'shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.' " (*People v.*

Walker (2002) 29 Cal.4th 577, 582.) While not an element of the enhancement, a felony conviction for the primary offense is an essential prerequisite to its imposition. (*In re Jovan B.* (1993) 6 Cal.4th 801, 814; *In re Ramey* (1999) 70 Cal.App.4th 508, 512.) Reducing the prior felony underlying the enhancements pursuant to section 1170.18 therefore raises issues regarding their ongoing viability.

Defendant claims that the trial court had to evaluate the circumstances before it at the time it resentenced him following its grant of his resentencing petition on the two commercial burglary convictions. Since the felonies underlying one of the prison priors and the primary offense for the section 12022.1 enhancement were now misdemeanors, defendant contends the trial court was precluded from imposing those enhancements when sentencing him. We disagree.[4]

In *People v. Garner* (2016) 244 Cal.App.4th 1113 (*Garner*), we concluded that when resentencing defendant under the resentencing provisions of Proposition 36 (§ 1170.126), the trial court had authority similar to that exercised by a trial court resentencing a defendant pursuant to section 1170, subdivision (d). (*Garner, supra,* at p. 1118.) Accordingly, when resentencing defendant, "the entire sentence may be reconsidered." (*Ibid.*) A trial court exercises similar authority when resentencing a defendant under section 1170.18. (*People v. Roach* (2016) 247 Cal.App.4th 178, 186-187.)

Section 1170, subdivision (d) "allows the trial court to reconsider its original sentence and impose any new sentence that would be permissible under the Determinate Sentencing Act *if the resentence were the original sentence* so long as the new aggregate

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[4] We reject the Attorney General's contention that defendant is estopped from raising this contention because he agreed to a stipulated sentence that included the enhancements as part of the plea agreement. (See *Harris v. Superior Court* (2016) 1 Cal.5th 984, 987 [the People not entitled to withdraw from plea agreement with stipulated sentence following grant of § 1170.18 petition].)

sentence does not exceed the original sentence. [Citations.]" (*People v. Johnson* (2004) 32 Cal.4th 260, 265, original italics.) A resentencing court may therefore revisit whether to impose a middle, upper, or lower term (*People v. Roach*, *supra*, 247 Cal.App.4th at p. 186), or whether or not to exercise its discretion to strike punishment for an enhancement pursuant to section 1385. (*Garner*, *supra*, 244 Cal.App.4th at p. 1117.)

The trial court's resentencing authority, while considerable, has limits. A resentencing court may not revisit a verdict of guilty or a true finding on an enhancement. (See *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1498 [§ 1170, subd. (d) confers jurisdiction to resentence, not to modify the verdict].) Defendant's contention here is not that the trial court should have exercised its discretion to strike the enhancements in the interests of justice pursuant to section 1385, but rather that the enhancements were invalidated once the underlying felonies necessary to their application were reduced to misdemeanors pursuant to section 1170.18. The contention addresses the continued validity of the admissions defendant made as to those enhancements when he entered his plea, an action occurring before sentencing.[5] This involves a retroactive application of

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[5] We are not persuaded by defendant's reliance on the Act's general purpose to reduce costs by reducing punishment for less serious offenders (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 2, p. 70), as well as its provision for liberal interpretation (*id*. at § 18, p. 74).

"Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' [Citation.]" (*Rodriguez v. United States* (1987) 480 U.S. 522, 526 [94 L.Ed.2d 533, 538]; accord, *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) This is true even where legislation calls for "liberal construction." (See, e.g., *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1510 [workers' compensation law].) The essence of lawmaking is the choice of deciding to what extent a particular objective outweighs any competing values, and a court in the guise of interpretation should not upset this balance where it is spelled out in the text of a statute. (*County of Sonoma v. Cohen*, *supra*, at p. 48.) The statements of

section 1170.18. We therefore conclude that defendant can only prevail if section 1170.18 applies retroactively to those enhancements.[6]

II

Defendant contends that section 1170.18 applies retroactively to invalidate the prison prior and on-bail enhancements.

Section 1170.18 does not apply retroactively. Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera* found that subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors, should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes.[7] (*Rivera*, *supra*, at p. 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded that the felony status of an offense charged as a felony did not change after the Act was passed, thereby

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purpose in the Act cannot be invoked to create an application that the text of the Act does not support.

[6] We are also not persuaded by defendant's reliance on *People v. Abdallah* (2016) 246 Cal.App.4th 736, because the felony underlying the defendant's prison prior had been reduced to a misdemeanor pursuant to section 1170.18 before the defendant admitted the prison prior at the sentencing hearing. (*People v. Abdallah*, *supra*, at pp. 740-741.)

[7] Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

conferring jurisdiction on the Court of Appeal.[8] (*Rivera, supra,* at pp. 1094-1095, 1099-1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

Rivera's interpretation of subdivision (k) is consistent with the Supreme Court's approach to section 17. In *People v. Park* (2013) 56 Cal.4th 782 (*Park*), the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b) could not subsequently be used to support an enhancement under section 667, subdivision (a). (*Park, supra*, at p. 798.) Applying the reduction to eliminate an enhancement would be a retroactive application, which is impermissible under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*. "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park, supra,* at p. 802.) Retroactive versus prospective application was also invoked by the Supreme Court in distinguishing cases cited by the Attorney General. "None of the cases relied upon by the Attorney General involves the situation in which the trial court has affirmatively exercised its discretion under section 17[, subdivision] (b) to reduce a wobbler to a misdemeanor before the defendant committed and was adjudged guilty of a subsequent serious felony offense." (*Park, supra,* at pp. 799-800.) In the case before us,

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8 *Rivera* also noted the absence of any evidence that the voters wanted to go beyond directly reducing future and past punishment for convictions under the six included offenses. (*Rivera, supra,* 233 Cal.App.4th at p. 1100 ["Nothing in the text of Proposition 47 or the ballot materials for Proposition 47—including the uncodified portions of the measure, the official title and summary, the analysis by the legislative analyst, or the arguments in favor or against Proposition 47—contains any indication that Proposition 47 or the language of []subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction"].)

defendant committed his current felonies before his prior convictions could be reduced to a misdemeanor; applying that reduction to eliminate the corresponding prior prison term enhancement would therefore be an impermissible retroactive application of the Act.

Park is not the only example of the Supreme Court finding that reducing a felony to a misdemeanor pursuant to section 17 is not applied retroactively. For example, if a defendant is convicted of a wobbler and is placed on probation without imposition of sentence, the crime is considered a felony "unless subsequently 'reduced to a misdemeanor by the sentencing court' pursuant to section 17, subdivision (b)." (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439 (*Feyrer*).) "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." (*Id.* at p. 439.) It has therefore long been the rule regarding section 17 that "as applied to a crime which is punishable either as felony or as misdemeanor: 'the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect . . . .' " (*People v. Banks* (1959) 53 Cal.2d 370, 381-382, quoting *Doble v. Superior Court* (1925) 197 Cal. 556, 576-577 (*Doble*).)

Defendant seeks to distinguish section 17 from subdivision (k). He notes that under section 17, when a crime is punishable as a misdemeanor or felony, it is a "misdemeanor for all purposes" under various conditions including "[a]fter a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." (§ 17, subd. (b)(1).) Relying on *Doble*, defendant contends that those terms are key to understanding why section 17 is not given retroactive effect. Since subdivision (k) does not use terms like "after" or "when" to describe the treatment of offenses designated as misdemeanors, he concludes that it is thereby distinguished from section 17, rendering the cases declining to give retroactive effect to section 17 inapposite.

The defendant in *Doble* was charged with various crimes including six offenses punishable as misdemeanors or felonies. (*Doble, supra*, 197 Cal. at pp. 557-558.) At that time, the statute of limitations for all misdemeanors was one year. (*Id*. at p. 558.) Since defendant was charged more than a year after the offenses, he contended that prosecution was barred. (*Ibid*.) The Supreme Court addressed an argument that the "for all purposes" language of section 17 would bar prosecution because a misdemeanor judgment would be given both prospective and retroactive effect. (*Doble, supra*, at pp. 575-576.) The Supreme Court rejected this reasoning, as it "ignores the language—'after a judgment imposing a punishment other than imprisonment in the state prison'—following the phrase 'shall be deemed a misdemeanor for all purposes.' " (*Id*. at p. 576.) The high court held: "A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section, the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned." (*Doble, supra*, at pp. 576-577.)

The absence of the term "[a]fter a judgment imposing a punishment other than imprisonment in the state prison," does not support a retroactive application of subdivision (k). That phrase is used only in the provision of section 17 addressing an initial misdemeanor sentence, section 17, subdivision (b)(1). Under this provision, a felony conviction will be treated as a "misdemeanor for all purposes . . . . [¶] . . . When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17, subd. (b)(3).) This provision was at issue in *Feyrer* and *Park*, and, as previously stated, was not given retroactive effect in those cases. (See *Feyrer, supra*, 48 Cal.4th at p. 439; *Park, supra*, 56 Cal.4th at

pp. 787, 802.) Subdivision (k) operates in the same manner, treating a felony conviction as a felony until it is reduced to a misdemeanor under section 1170.18. "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k).) Under the language of subdivision (k), a felony subject to Proposition 47 remains a felony *until* it is reduced to a misdemeanor pursuant to section 1170.18. As with section 17, subdivision (b)(3), reducing the felony to a misdemeanor pursuant to section 1170.18 is not given retroactive effect.

Defendant relies on *In re Estrada* (1965) 63 Cal.2d 740 in support of Proposition 47's purpose in reducing punishment supporting its retroactive application. *In re Estrada* held that if an amended statute mitigates punishment, the amendment will operate retroactively to impose the lighter punishment unless there is a saving clause. (*In re Estrada, supra,* at p. 748.) The reason for this rule was that " '[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.' " (*Id*. at p. 745.) While the electorate intended to reduce penalties for crimes when it passed the Act, it did so only for those crimes the Act specifically covers. Retroactivity is limited to the procedures set forth in section 1170.18, which in turn applies to the offenses specifically addressed by the Act. The prior prison term and on-bail enhancements are not among those provisions, and therefore are not subject to the Act's retroactive application.

Defendant's other claims fare no better. Subdivision (k) states that an offense reduced to a misdemeanor "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her

custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." Citing the maxim "under which 'the enumeration of things to which a statute applies is presumed to exclude things not mentioned' [citation]" (see *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 89-90), defendant claims that if the electorate intended for there to be other exceptions to the " 'for all purposes' " language, it would have included them in section 1170.18.

The expression of a limitation on how the misdemeanor designation applies once it has been established, however, does not clearly and compellingly imply that the electorate thereby intended to place no limitation on when the designation applies in the continuum of time. This is particularly true where, as here, the same language was held by the Supreme Court not to apply retroactively. The Act's retroactivity is addressed in subdivision (a) of section 1170.18, which lists the provisions subject to the Act's retroactive application. Notably absent from that list are the prior prison term and on-bail enhancements.

Defendant also notes different terminology used in subdivision (b) of section 1170.18, which authorizes a trial court to "recall" and "resentence" a defendant currently serving a sentence for a crime subject to the Act, and subdivisions (f) and (g), which authorize a trial court to "redesignate" a felony as a misdemeanor when a defendant has already completed the sentence for the crime.[9] He claims the different terminology "is

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[9] Section 1170.18 states in pertinent part: "(b) . . . If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . . [¶] . . . (f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions

meaningful, and should be interpreted to effectuate the voters' intent." Since section 1170.18 does not define those terms, defendant looks to Black's Law Dictionary, which defines "recall" as a "[r]evocation of a judgment for factual or legal reasons," and "resentence" as "[t]he act or an instance of imposing a new or revised criminal sentence." (Black's Law Dict. (9th ed. 2009) pp. 1381, 1422.) According to defendant, the use of these terms show "an intent to hold further proceedings and further the policies of reducing costs and punishment for a petitioner currently serving a sentence," while the term " 'redesignation' can only further the policy of reducing the punishment by relabeling the violations on a petitioner's record."

These provisions use different language because they address different situations. The fact that a trial court resentences a petitioner currently serving a term for an offense reduced to a misdemeanor has no bearing on whether granting a petition on an offense specifically covered by section 1170.18 applies retroactively to invalidate an enhancement that is not mentioned in section 1170.18 or anywhere else in the Act. The relevant language governing this possible retroactive application of the Act is in subdivision (k), which does not support the retroactive application sought by defendant.

Since Proposition 47 is not intended to apply retroactively to enhancements, the trial court correctly denied defendant's petition as to the prison prior and on-bail enhancements.

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designated as misdemeanors. [¶] (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

DISPOSITION

The judgments (orders) are affirmed.

NICHOLSON, Acting P. J.

We concur:

HULL, J.

MURRAY, J.